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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

GUY A. THOMPSON, TRUSTEE,
INTERNATIONAL GREAT NORTHERN RAILROAD COMPANY,
Petitioner,

v.

AMERICAN ABRASIVE METALS COMPANY, *Respondent*

On Petition for Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

BRIEF OF RESPONDENT IN OPPOSITION

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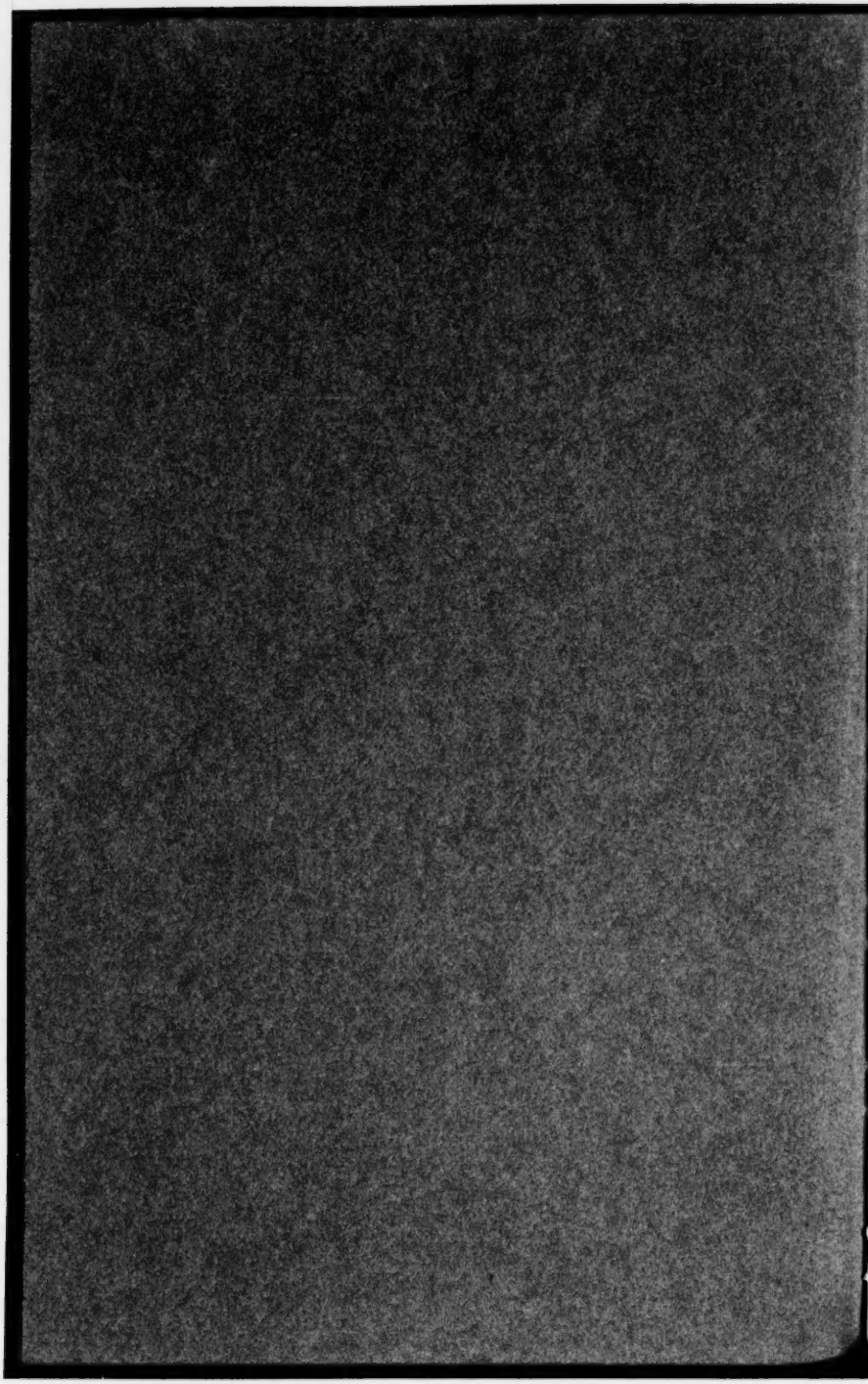

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Opinion Below

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas (R. 31-36) is reported at 253 S.W. 2d 83.

Jurisdiction

The procedural steps precedent to invoking the jurisdiction of the Supreme Court of the United States have been as set forth in the Petition. However, no substantial Federal question heretofore undecided by this Honorable Court is involved. The challenged judgment allowed recovery by an interstate less-than-carload shipper through a freight forwarder against the underlying carrier on the bill of lading issued by the carrier to the freight forwarder of damages to the shipper's property. It will be developed that prior decisions of this Court allow such recovery.

Question Presented

The question presented is:

Can an interstate shipper through a freight forwarder recover from the underlying carrier damaging the shipment on the bill of lading issued to the freight forwarder?

The Courts below answered the question in the affirmative.

The Petition states six questions, but each is concededly a mere rephrasing of the one basic question presented.

Statute Involved

The only statute involved is Part IV of the INTERSTATE COMMERCE ACT, 49 U.S.C.A., Section 1001, et seq. (Freight Forwarders Act).

Statement

Respondent made an interstate shipment of paint through a freight forwarder. Petitioner, an underlying rail carrier, received the shipment under the bill of lading issued to the freight forwarder in good condition and properly prepared for shipment. Petitioner delivered the shipment in damaged

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condition. Respondent sued Petitioner in the District Court of Harris County, Texas, for damages to Respondent's property based upon breach of contract by Petitioner, i.e., the bill of lading issued to the freight forwarder under which Petitioner undertook transportation of the property (R. 1-7). The case was tried on an agreed stipulation of facts (R. 10-26). The stipulation of facts included the Uniform Straight Bill of Lading issued to the freight forwarder under which Petitioner undertook transportation of Respondent's property. The basic contract term and condition of Petitioner's liability under the bill of lading for damage to Respondent's property is as follows:

> "The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." (R. 17).

The stipulation of facts specifically negatives the existence of any exception to common law liability of the carrier thereafter set out in the bill of lading (R. 10-15).

Petitioner defended on the sole ground that Respondent as a less-than-carload shipper through a freight forwarder had no right of recovery for breach of contract based upon the bill of lading issued to the freight forwarder under which Petitioner undertook transportation of Respondent's property (R. 8-9).

The trial court rendered judgment for Respondent against Petitioner for recovery of the stipulated amount of damages to Respondent's property (R. 26-28).

The Court of Civil Appeals for the First Supreme Judicial District of Texas affirmed the judgment of the trial court, holding in its opinion that Respondent as an l.c.l. shipper through a freight forwarder could recover in a breach of contract action on the bill of lading issued to

the freight forwarder under which Petitioner undertook transportation of Respondent's property and that such recovery is not precluded by Part IV of the INTERSTATE COMMERCE ACT, 49 U.S.C.A., Section 1001 et seq. commonly known as the Freight-Forwarders Act (R. 31-36).

Argument

The issue in the present case narrows to whether a shipper through a freight forwarder can sue on the bill of lading issued to the freight forwarder. The stipulated facts admittedly establish liability under the contract provisions of the bill of lading if a shipper through a freight forwarder can base an action thereon. There is no tort action or question of tort liability involved. The recovery is on the contract.

I.

THE DECISION BELOW IS SUSTAINED BY PRIOR UNITED STATES SUPREME COURT DECISIONS

There can be no doubt whatever that prior to the enactment of Part IV of the INTERSTATE COMMERCE ACT (Freight-Forwarders Act) the United States Supreme Court sustained the right of a shipper through a freight forwarder to maintain an action directly against the carrier with whom the freight forwarder placed the goods for transportation for loss of or damage to the goods.

As early as 1848 such recovery was sustained in the case of THE NEW JERSEY STEAM NAVIGATION COMPANY v. THE MERCHANTS' BANK, 6 How. 344, 12 L. Ed. 465. In that case the Bank placed coins with Harnden for shipment and Harnden delivered the goods to The New Jersey Steam Navigation Company for actual shipment on its boat, the Lexington, and the coins were lost in a fire in the course of shipment. The Bank was permitted to recover in an action

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directly against the navigation company on the basis of the contract between the navigation company and Harnden. In permitting recovery on the basis of such contract, the United States Supreme Court said in part:

> "Under these circumstances, the contract between Harnden and the Respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libelants; and although in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names."

Later in GREAT NORTHERN RAILWAY COMPANY v. O'CONNOR, 232 U.S. 508, 34 S. Ct. 380, 58 L. Ed. 703, the United States Supreme Court held that O'Connor, who had placed a less-than-carload shipment of furniture with a freight forwarder for transportation from Minnesota to Portland, could maintain suit directly against the railroad company with whom the freight forwarder had placed the furniture for shipment for loss of the furniture by the railroad company in the course of shipment. The Court recognized that the recovery was based upon the bill of lading issued by the carrier to the freight forwarder and limited the recovery of the shipper to that permitted by the contract terms of the bill of lading, i.e., restricting the amount of the judgment to the declared value of the furniture placed thereon by the freight forwarder in the bill of lading issued by the carrier.

It, therefore, follows that the right of a shipper through a freight forwarder to maintain an action directly against the carrier on the bill of lading issued to the freight forwarder continues unless it has been cut off and destroyed by Part IV of the Interstate Commerce Act (Freight-Forwarders Act). There is no express provision of the Freight-Forwarders Act eliminating this pre-existing right

of action. There is no provision of such Act liquidating such cause of action by reasonable implication or even by remote inference. Petitioner points to none. The statute is one providing for detailed regulation of freight forwarders. It neither provides nor implies any relief of carriers from pre-existing liabilities on their bills of lading issued to freight forwarders.

The United States Supreme Court has expressly recognized that the enactment of Part IV of the Interstate Commerce Act did not destroy the right of a shipper through a freight forwarder to maintain an action against the responsible carrier damaging the shipment as an undisclosed principal to the bill of lading issued to the freight forwarder. In CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY v. ACME FAST FREIGHT, INC., 336 U.S. 465, 93 L. Ed. 817, the United States Supreme Court held that a freight forwarder was not subrogated to its shipper's right of action against the responsible carrier but that the freight forwarder's action against the carrier must be based upon the bill of lading issued to the freight forwarder by the carrier. In so doing, the opinion states in part in Footnote 27 at 336 U.S. 489, 93 L. Ed. 831:

> "The forwarder, however, is a party to the contract with the carrier. It has no need for subrogation to the shipper's rights, as Representative Wolverton indicated. Its recovery against the carrier *has always been* upon 'the bill of lading issued to it by such carrier and under the provisions of law applicable thereto'. That right remains." (Italics ours).

In the quoted language, the Court recognized that the shipper's rights against the carrier continued but simply held that the freight forwarder's right of action is and *has always been* on the bill of lading issued by the carrier to

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the freight forwarder and not by way of subrogation to the shipper's rights. The Court of Appeals had concluded that such a holding would necessitate a finding that the shipper had no rights against the carrier. Again in Footnote 27 the Court points out that the conclusion that the shipper has no rights against the carrier does not follow from a holding that the freight forwarder is not subrogated thereto, saying in part:

> "The Court of Appeals rejected Representative Wolverton's analysis of Section 1013 as based on the erroneous premise that the shipper by freight forwarder never had any right of action against the carrier, and therefore the forwarder can have no right of subrogation under Section 20(12). *The Court felt that this rationale indicates a withdrawal of the shipper's common-law right of recovery against the responsible carrier,* and consequently the placing of the forwarder in the position of an insurer with no right against the carrier responsible for loss or damage.
>
> "*We do not so read that analysis.* * * * ." (Italics ours).

After denying that refusal of subrogation to the freight forwarder meant that the shipper had no rights against the carrier, the Court's opinion in Footnote 27, continuing immediately after the language last quoted above, expressly recognizes the existence of the shipper's right of action against the carrier on the bill of lading issued to the freight forwarder, as follows:

> "Of course shippers by freight forwarder have for many years been permitted to sue underlying carriers for loss or damage occasioned by the latter. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U.S.) 344, 12 L. Ed. 465 (1848); Great Northern R. Co. v. O'Connor, 232 U.S. 508, 58 L. Ed. 704, 34 S. Ct. 380,

8 NCCA 53 (1914). The theory of these actions was that the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. The forwarder, as agent of an undisclosed principal, could, of course, sue on the contract. Merchant Shippers Asso. v. Kellogg Exp. & Draying Co., 28 Cal. 2d 594, 170 2d 923. See Bunge, Draymen, Freight Forwarders and Warehousemen, p. 117. See also Am. L. Inst. Restatement, Agency, Vol. 2, Sections 322, 364. * * *."

Citing the NEW JERSEY STEAM NAVIGATION COMPANY case and the GREAT NORTHERN RAILROAD COMPANY case, both of which permitted a shipper through a freight forwarder to recover from the carrier on the basis of the contract between the freight forwarder and the carrier, with approval, the United States Supreme Court in the ACME FAST FREIGHT case seems to have clearly stated that the right of action in a shipper through a freight forwarder against the carrier on the bill of lading issued to the freight forwarder continues in effect. This necessarily followed from the fact that there is no express or implied provision in Part IV of the Interstate Commerce Act destroying this pre-existing and long-established right of action. This is dispositive of the case at bar.

II.

THERE IS NO CONFLICT OF DECISION AND NO SUBSTANTIAL FEDERAL QUESTION INVOLVED

There appears to be no conflict of judicial decision on the sole issue raised by the Petition. The Court below held consistently with the United States Supreme Court decisions in the NEW JERSEY STEAM NAVIGATION COMPANY case, the GREAT NORTHERN RAILROAD COMPANY case, and the ACME FAST FREIGHT case that a shipper through a freight

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forwarder may maintain an action against the carrier on the bill of lading issued to the freight forwarder. The Petition and the Supporting Brief point to no decision to the contrary.

There is no substantial Federal question involved. The only issue involved was decided by this Court in THE NEW JERSEY STEAM NAVIGATION COMPANY case and THE GREAT NORTHERN RAILROAD COMPANY case and reaffirmed in the recent ACME FAST FREIGHT case.

The very contract liability to which the Petitioner agreed in the bill of lading issued to the freight forwarder (R. 17) was that "the carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." The only exceptions to such common law liability thereafter contained in the bill of lading are exceptions expressly negatived by the stipulation of facts. Such common law liability obviously included liability to the shipper through the freight forwarder. United States Supreme Court decisions had long recognized it. The statute had not negatived it. The contract itself did not take it away. This is a simple case of a state court judgment against Petitioner enforcing its clear and express contract liability.

Petitioner urges that the judgment below means a great multiplicity of suits against the responsible carrier by the numerous l. c. l. shippers with property in the carload shipment placed by a freight forwarder. That is a hypothetical case. It is not the case at bar. This is a single suit by a shipper through a freight forwarder to recover damages to the shipper's property from the responsible carrier under the express terms of the bill of lading under which the carrier undertook to transport the property. In any event, Congress has neither expressed nor implied an intention to destroy the well-established and long-existing right of re-

covery of an individual shipper through a freight forwarder from the responsible carrier on the terms of the bill of lading issued to the freight forwarder. If such should be done, it can only be accomplished through further Congressional action.

Conclusion

Since the decision below is sustained by prior United States Supreme Court decisions, because there is no conflict of decision on the sole issue involved, and because no substantial or unsettled Federal question is presented, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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Counsel for Petitioner, Messrs. Hutcheson, Taliaferro, and Hutcheson, Niels Esperson Building, Houston, Texas, Messrs. Woodul, Arterbury, and Wren, Walter F. Woodul, and Howard S. Hoover, Chronicle Building, Houston, Texas, have been furnished copies of this Brief on this the 17th day of July, A. D., 1953.

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